THE

AMERICAN LAW REGISTER.

MARCH, 1857.

OF THE DISQUALIFICATION OF PARTIES AS WITNESSES.

"The Law that is the perfection of reason, cannot suffer any thing that is *inconvenient.*"—COKE.

"*Truth*, which only doth judge itself, teacheth, that the inquiry of truth, which is the love making or wooing of it; the knowledge of truth, which is the presence of it; and the belief of truth, which is the enjoying of it; is the sovereign good of human nature."—BACON.

No rule of evidence is better settled than that which excludes parties from being witnesses in their own suit. All the writers, from Baron Gilbert down to Greenleaf, agree in saying that any immediate legal interest in the event of an action renders the interested party incompetent as a witness in that action.

"When a man,"[1] says Gilbert, the first writer on evidence, who flourished about the time of Queen Anne's reign, "who is interested in the matter in question, comes to prove it, it is rather a ground for distrust than any just cause for belief; for men are generally so short-sighted as to look at their own private benefit, which is near to them, rather than to the good of the world, which is more remote;

[1] 1 Gilb. Ev. 224.

therefore, from the nature of human passions and actions, there is more reason to distrust such a biased testimony than to believe it. It is also easy for persons who are prejudiced and prepossessed, to put false and unequal glosses upon what they give in evidence; and therefore the law *removes them from testimony, to prevent their sliding into perjury;* and it can be no injury to truth to remove those from the jury, whose *testimony may hurt themselves*, and *can never induce any rational belief.*"

The only writer who entertains any doubt as to the soundness of this doctrine, is Jeremy Bentham, in whose work on "Judicial Evidence" may be found a long and able discussion of the question, taking the position that the regulation is against nature and sound sense.

It is also a rule of the common law, that no party to a suit shall be compelled to give testimony for the opposite party.

Both these rules seem to have sprung from the civil law. The cardinal maxims of the Roman jurists upon this subject, were: "*Nullus idoneus testis in re sua intelligitur;*" "*Omnibus in re propria dicendi testimonii fucultatem jura submoverunt;*" "*Nemo tenetur seipsum prodere.*"

It is our object to examine the grounds of these rules, and to inquire whether they are founded in justice; and, more particularly, to investigate the propriety of the exclusion of parties as witnesses in their own suits at law.

We must not suppose, however, that those arbitrary rules have always had sway. In the earliest times, before the humanizing influences of Christianity and civilization had dawned upon the world, the settlement of litigations was a matter of comparatively small importance, and the simplest means were taken to dispose of these troublesome affairs. If one man fancied that he had sustained an injury from another, the parties, by mutual consent, went before the sovereign of the country, the governor, the judge, appointed to hear and decide such questions, or even some disinterested neighbor; they told their respective stories, the arbitrator decided between them; and by his decision the parties were in law and in honor bound to abide. In those days, the scales of justice were unencumbered with the infinitesimal small weights of modern rules of evidence.

But as men became more refined, and as the arts and trades increased in value and importance, and as Commerce extended her white wings over the ocean, and as the barbarities of war were softened, and as nations grew to regard each other in more friendly aspects, it would seem as if man's faith in man grew less in geometrical proportion. It would seem as if when man grew rich, he became dishonorable; as if when he became civilized, his word could no longer be trusted; as if when he received Christianity, he became more exposed to the temptations of perjury; in short, it would seem as if the human race, instead of growing in wisdom and virtue, had degenerated into iniquity, and that all the advantages and privileges which we possess over our ancestors, have only sufficed to make us their inferiors in honesty. The restraints of technical rules have been thrown up as barriers against the admission of parties on their own behalf in suits at law. The simplicity, brevity, and we may say, the equity, of legal proceedings, have been in a manner destroyed.

The individuals who were once considered the most natural and proper witnesses to prove the charge of the parties, are now rejected as the most dangerous and unreliable, and their testimony is scrupulously shut out. The only persons who knew all the facts and circumstances connected with the subject matter of a law suit, are now the only persons who are not competent witnesses in that suit.

The only conceivable objection that can be urged against a repeal of these rules, is the pretended inducement to the commission of perjury that it would afford. And yet as things now stand, a wicked or designing man can easily accomplish his purposes by the subornation of perjury. A man who will himself swear falsely, can generally find others who will do the same thing, and thus he may accomplish his end indirectly, and that without rendering himself liable to the same danger of exposure that would be attendant upon false swearing. So great has this evil become, that the same punishment is now inflicted upon the perjurer and the suborner of perjury.

Again, there are numerous cases in which the law is forced to waive these rules, from motives of necessity, or of public policy, as the writers on evidence say. There are many instances in which a man may be his own witness; as where the party against whom the oath is offered has been guilty of some fraud, or of some tortious

and unwarrantable act of intermeddling with the complainant's goods;[1] in many cases of bailment, as to prove the contents of a trunk lost during transportation by a common carrier.[2] A party may become a witness to prove the loss of a deed or other paper, preparatory to the offering of secondary evidence to show its contents.[3] So, to procure a continuance of a suit, in order to obtain testimony.[4] Also, to prove entries in books, under certain circumstances.[5] So, too, his affidavits are admissible to establish the materiality of a witness; to show diligent search for a witness, and in some other instances preparatory to and attendant upon the trial of an action.[6] The answer of a defendant in equity, so far as it is responsive to the bill, is admitted as evidence in his favor as well as against him.[7] The oath of an inventor, made prior to the issuing of letters patent, that he was the first and true inventor, may be opposed, in a question concerning originality of the invention, to the testimony of witnesses produced to prove that the invention was not original.[8] In an action of malicious prosecution for causing the defendant to be indicted, proof of the evidence given by the defendant on the trial of the indictment, is admissible to show probable cause.[9] An account of sale rendered by a consignee is sometimes evidence in his favor against the consignor.[10] In some States, in a defence of usury, the defendant may be sworn to prove the usurious transaction.[11]

In actions of a criminal nature, the same exceptions are made, from the same motives. It may perhaps be contended that in these cases the complainant can have no interest. It is often true that he may have no immediate *pecuniary* interest, but where that is lacking he may have a *moral* interest, entirely paramount to any paltry consideration of gain or loss. Thus, one who has been robbed or assaulted, may, by his own oath, prove the robbery or assault.[12] In proceeding under the filiation laws, the mother of a

[1] 1 Tait on Ev. 280.
[2] 1 Greenl. R. 27.
[3] 1 Peters, 591.
[4] 1 Greenl. Ev. § 349.
[5] 12 Metc. 44.
[6] 1 Greenl. Ev. § 349.
[7] 9 Cranch, 160.
[8] 1 Story, 336.
[9] 6 Mod. 216.
[10] 4 Cranch, 163.
[11] R. S. Mass., c. 35, § 4; Maine, c. 69, § 3; Kentucky, c. 37, art. 2, § 38.
[12] 1 Bull. N. P. 187, 289.

bastard may always swear as to the paternity of her child.[1] In actions of a *qui tam* nature, the complainant may always be a competent witness on behalf of the people.[2] And this is an instance where the witness has a pecuniary, as well as a moral, interest; for often the establishment of his claim to receive part of the fine may depend altogether upon his own oath. In an action for rape the complainant is a competent, and generally, the only witness for the prosecution.[3] And as regards this last class of cases, it seems to us that an application of Sancho Panza's rule might be generally conducive to the development of truth. That immortal personage, during his gubernatorial dignity, when a woman came before him, complaining that a rape had been committed upon her person by the prisoner, asked her if she had any money about her? On receiving an affirmative answer, he commanded the defendant to take it away. After a long and desperate struggle, the man acknowledged to the governor that he was unable to do it. "Go, woman," said the sage; "hadst thou been as careful of thy chastity as thou art of thy money, thou wouldst never have lost it!"

The maxim, "*Nemo tenetur seipsum prodere*," also, is not universally applied, as an extract from Greenleaf will show:

"In some cases at law, and generally by the course of proceedings in equity, one party may appeal to the conscience of the other, by calling him to answer interrogatories upon oath. But this act of the adversary may be regarded as an *emphatic admission*, that, in that instance, the *party is worthy of credit*, and that his *known integrity is a sufficient guaranty against the danger of falsehood*."[4]

Other instances might be cited in which the law has abated its rigor in respect to the exclusion of the parties from testifying, but we have already quoted enough to establish the fact. The law, therefore, plainly admits, that in many cases the enforcing of these rules would occasion great inconvenience, and often a total failure of justice. But if the principle is right, no exception should be allowed. It either is, or is not, right. If it is right and equitable, not even the smallest departure from it should be tolerated by courts.

[1] 1 Greenl. Ev. p. 463, note 4.
[2] 16 Peters, 203.
[3] 3 Greenl. Ev. § 212.
[4] 1 Greenl. Ev. § 329.

It should be strictly carried into effect, and if occasional injustice should thereby be done, still, the inconvenience should be borne, with the reflection that the smaller evils which might arise from its enforcement must in the end be less oppressive than the greater ones which would certainly be consequent upon its relaxation. Every departure from a recognized and established rule or principle of law, necessarily weakens its authority, and subjects it to the criticising of those interested in the administration of justice. Most of the received maxims of evidence are simple, just, and incontrovertible; they have withstood the assault of ages, and have been embellished and illustrated by the *dicta* of judges and the learning of sages. But the rule under present consideration seems to us unjust, inconsistent, and impracticable. It has worked much injury in past times to the rights of deserving men, and has retarded the due course of justice in a greater degree than any other canon to be found in the books.

We propose to consider briefly some advantages which would arise from its repeal.

In the first place, then, we claim that its repeal would promote the elucidation of truth in our courts. The principal ground of belief is faith in human testimony. There is of necessity more truth than falsehood in the world. If it were otherwise, we should be unable to place any reliance upon the commonest representations of everyday life. There are, it is to be feared, many who "love and make a lie;" but the number of those who would commit deliberate perjury, is probably, in comparison with that of the truthful, no greater than the number of convicts in our State prisons, compared with the great mass of sober and industrious and upright citizens. But it may be said that this is not a fair comparison; there are many rascals still at large. We answer, that there are many innocent persons in confinement. As every individual at large in the world is not pure, so every person in our penetentiaries is not vile. The probability is, that ninety-nine out of every one hundred plaintiffs and defendants would tell the truth if put upon the witness stand.

Again, how inconsistent is, sometimes, the working of the rule

which we are considering. We can conceive of a man, pure and unblemished in reputation, of sober and regular habits, of disinterested benevolence, of high moral aims, of elevated philanthropy; one whose good deeds are in every man's mouth; one whom the world honors, whom God loves, and whom even villains respect. We can also conceive of another man, sunk and steeped in vice and crime; a gambler, a libertine, a blasphemer; one whose "conscience is seared as if with a hot iron;" whose moral sense is blunted by wickedness; one who is despised by his fellows, and whose existence is an offence in the eyes of his Maker. We may suppose these two men to know precisely the same state of facts in reference to a litigation. The former, if he has the interest of two shillings in the event of the suit, cannot open his mouth in court; but the latter, because he has no pecuniary interest, is a competent witness, and his evidence goes to the jury. The former is excluded through fear of his "sliding into perjury;" but the latter, who perhaps, has not spoken the truth within the memory of men now living, is freely admitted.

A repeal of this rule would tend to the elucidation of truth; first, because the parties who, alone of all men, have a full and complete knowledge of the transactions in dispute, would be confronted and sworn, and their stories compared and weighed by twelve disinterested men. How many a cause has been lost for the want of proof of a fact which lay in the knowledge of one of the parties alone! There is no remedy in such a case. Justice is misled. According to old Baron Gilbert's doctrine, such an anomaly as an honest law suit was never known; for he says: "It is not to be presumed that a man who complains without cause,or defends without justice, should have honesty enough to confess it."[1] But in our times a more enlightened belief is inevitable.

Again, the parties would be subject to the same tests as ordinary witnesses. They would take the same oath—an awful and solemn promise before God and man. They would submit to the same cross-examination—at once the most perfect and effectual system for the unraveling of falsehood ever devised by the ingenuity of

[1] 1 Gilb. Ev. 243.

mortals. The minutest circumstance, the smallest fact would be forced upon the mind of such a witness. There could be no escape from the vigorous sifting of his testimony. If he is refractory, he will be met by a determination equal to his own. If he is equivocal, he will be pushed to the wall, and made to declare himself explicitly. Conscious that everything depends upon his own story and appearance, he will be scrupulous in his statements, not deviating from the exact truth. His voice, his eyes, his manner, will be remarked and commented on by the jury. If in spite of all these guards, he lies successfully, he must be a shrewder man than most of his fellows; for he must not only deceive the opposing counsel, but the judge on his bench and the jury in their box.

Another advantage which would flow from the reform proposed, would be discoverable in the shortening of law suits, and the simplification of questions of evidence. It is notorious that our laws are tardy in their operation. It takes one-tenth of the active business community all the time to try the law suits of the rest. This is a moderate estimate, if we consider the time occupied in our courts references, and arbitrations, by parties, witnesses, judges, juries, and counsel. At our circuits, it is seldom that more than one suit is daily disposed of, on the average. [Our judges of the Supreme Court in this State[1] long ago discovered this, and recently passed a rule requiring counsel to stand, and to refrain from taking notes while examining witnesses. This was a reform, but not *the* reform. It does not answer the object sought.] So long as parties are shut out as witnesses, so long our litigations will be tedious. An incalculable amount of extraneous and cumulative testimony is now admitted, and hours are consumed at the circuits in arguing nice, and difficult questions of evidence, which owe their rise and existence entirely to the present state of things. If the law were changed in this respect, in many cases no other testimony than that of the parties would be necessary; the labors of counsel and judges would be lightened, jurymen would not be kept away from their employments; the cause of truth would be advanced, and all parties would be better satisfied with a litigation free from the burdens of our present system, and equally answering it in every desirable respect.

[1] New York.

Lawyers would have an increase of business, for more suits would be brought; and with this triple appeal to head, heart, and *pocket*, we may hope to obtain their influence in accomplishing this most desirable of all legal reforms. Much of the stigma which is now thrown upon our profession by the mass, would be removed. We should no longer have the reputation of obstructing the course of justice to fill our own coffers, and our clients would pay our reasonable demands with a better grace. There could no longer be any semblance of reason in the saying of Cornelius Agrippa, that, "the calling of advocates is to prevent equity."

We rejoice to see that the spirit of reform is at work, and that many important movements have been made towards bringing about this desirable object. It is an innovation upon old established and honored customs, and like all other reforms, must be gradual. "Reformers, generally, have to draw upon posterity for their reward."[1] But, says Lord Bacon, "surely every medicine is an innovation, and he that will not apply new remedies, must expect new evils; for time is the greatest innovator; and if time, of course, alter things to the worse, and wisdom and counsel shall not alter them to the better, what shall be the end?"[2] There are many prejudices to be overcome before a way can be clear for our design.

The initiate step in this matter was taken in England, in 1844, by the passage of "Lord Denman's Act," by which all disqualifications of witnesses, by reason of any interest in the event of the suit, were removed. The same enactment was adopted in our State by the code of procedure.[3] Neither of these statutes, however, goes the length of allowing a party to testify in his own behalf. In several States any party may compel his adversary to testify. In Michigan this can be done, but the applicant must first make affidavit that the desired testimony is material, and known to the adverse party, and that there is no other means of obtaining it.[4] In New York the adverse party may be called as a witness, and may testify in his own behalf, as to the matter in regard to which he is exam-

[1] Judge Edmond's address on the Code of Procedure, 1848.

[2] Bacon's Essay on "Innovations."

[3] New York Code § 398.

[4] R. S. 1846, c. 102, § 100.

ined in chief; and if he testifies to any new matter, the party calling him may also testify to such new matter.[1] This is considered a great step in the right path, and is a good indication of the spirit of our legislators. The law is precisely the same in Wisconsin.[2] In Missouri, parties may summon each other as witnesses in justice's courts, and if the party summoned refuse to appear or testify, the other may give his oath *in litem*.[3] In Massachusetts, the parties in civil actions may require of each other, upon written interrogatories, the discovery upon oath of any facts or documents material to the support or defence of the action; but neither party is bound to make any disclosure tending to criminate himself, or to discover his title to any other property not material to the issue, or to disclose the names of his own witnesses, or the intended mode of proving his case.[4] But it was left to the State of Connecticut to complete this great reform, and to set an example to her sister States and the world. It is somewhat singular that this little commonwealth, where a century ago it was unlawful for a man to kiss his wife on Sunday, or to drive to church in a gig, should be the first to adopt this most liberal doctrine. This is now the settled law of that State, as appears from the following enactment:—"No person shall be disqualified as a witness in any suit or proceeding at law or in equity, by reason of his interest in the event of the same, *as a party* or *otherwise*, or by reason of *his conviction of a crime;* but such interest or conviction may be shown for the purpose of affecting his credit."[5] By a subsequent statute this enactment was confined to civil actions. The same provision was enacted in Ohio, in 1853, with the exception, that where one party is an executor or administrator of a deceased person, and the subject of the suit concerns matter originating in the lifetime of that person, the other party cannot be sworn as a witness therein.[6]

These instances are sufficient to show that the current of opinion in this country and in England is favorable to throwing aside all the old disqualifications of interest.

[1] New York Code, § 395. [2] R. S. 1849, c. 98, Sec. 57-60. [3] R. S. c. 93, § 24-25.
[4] R. S. 1851, c. 233, § 98, 106—R. S. 1852, c. 312, § 61-69.
[5] R. S. 1854, p. 95, § 141-142. [6] R. S. 1854, c. 87, tit. 10, § 310.

No reform can be nearer to the heart, or more especially commend itself to the right reason of every high-minded and intelligent lawyer. It has for its object the simplification of legal proceedings, the advancement of truth, and the good of mankind. We do not despair of seeing it adopted all over this land during our lifetime. Greater reforms, even, than this, have been effected almost instantaneously. Once, a man indicted for felony in England, was not allowed to have any counsel, but was dependent upon the mercy of his judge. Once, a criminal was hung for stealing sixpence. Once, confessions were wrung out of unwilling lips, on the rack. These abuses have been banished from our criminal codes, and now is proposed a reform equally important to the interests of suitors in civil actions. It is proposed to clear our common law of a maxim whose effect is to defeat justice, and which presupposes that there is no honesty in the human race. It is proposed to let every man, good or bad, speak freely in our courts, and to submit the task of deciding between the adverse parties, to a jury fully conversant with every fact in each case. It is one of our boasts that we have the privilege of submitting our disputes to the arbitration of a jury of our peers. Let it also be our boast that we can stand up in open court, and under the sanction of an solemn oath, tell our grievances freely, and without fear of reproach. Where juries are now in the dark, and grope blindly after truth, they will be enabled to see the truth face to face; and where justice was once dimly *guessed at*, it will be grasped with certainty, and brought palpably to view. Those who would otherwise be debarred from prosecuting their just demands, will have opportunity to present their claims for adjudication. The effect of the whole will be, instead of promoting perjury, to force men to become more honest; for where a contract is made, each will be upon his guard, knowing that at any moment his adversary may step forward, and expose any attempt at iniquity or fraud.

We hope to see the time when not only all these restrictions as to parties shall be abolished, but when every person, however infamous, may be a competent witness; when no peculiar form of reli-

gious belief should shut out any one from testifying;[1] and when all men, in the possession of their reasoning faculties, understanding the nature and believing in the sanction of an oath, shall be permitted to speak that which they do know.

Then only will our system of jurisprudence be perfect. Then only will be established the great idea, that man, formed in the image of his maker, should cherish faith in his fellow. Then only will arrive that epoch prophecied by a golden poet of a golden age:[2]

"Jam fides,———————
———————et neglecta redire Virtus
Audet."

And, then, only will be vindicated the majesty and splendor of that LAW, whose "seat is the bosom of God; whose voice is the harmony of the world."[3] B.

RECENT AMERICAN DECISIONS.

District Court of the United States, Southern District of Ohio—October Term, 1856.

THE UNITED STATES *vs.* CHARLES K. SMITH.

1. The act of Congress of the 3d of March, 1797, provides, that in a suit by the United States to recover a balance due on the books of the Treasury Department, the defendant cannot give in evidence as a set-off, a claim against the government, which has not previously been presented to, and disallowed by the proper accounting officer, without proving that it was not before in his power to produce the voucher for such claim, and that he was prevented from exhibiting it, "by absence from the United States, or some unavoidable accident."

2. The rejection of an account or claim against the United States, by an accounting officer of the government, authorized by a special act of Congress to adjust the same on equitable principles, does not preclude the defendant, when sued, from setting up such rejected claim or account, as a set-off.

[1] It has recently been decided by Judge Manly, in North Carolina, that by the laws of that State, Universalists are not competent witnesses.

[2] Hor. Carm. Sec.

[3] We do not entirely concur with our correspondent, but we present his well-written paper to our readers for their consideration.—*Eds. Am. Law Reg.*